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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 672

GENERAL TOMOYUKI YAMASHITA,

Petitioner;

vs.

**LIEUTENANT GENERAL WILHELM D. STYER, COM-
MANDING GENERAL, UNITED STATES ARMY FORCES, WESTERN
PACIFIC**

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH OF
THE PHILIPPINES, AND BRIEF IN SUPPORT
THEREOF.**

COLONEL HARRY E. CLARKE, JAGD,

Lt. Col. WALTER C. HENDRIX, JAGD,

Lt. Col. JAMES G. FELDHAUS, JAGD,

MAJOR GEORGE F. GUY, Cav.,

CAPTAIN A. FRANK REEL, JAGD,

CAPTAIN MILTON SANDBERG, JAGD,

Counsel for Petitioner.

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PACIFIC

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE PHILIPPINES AND
BRIEF IN SUPPORT THEREOF.**

MAY IT PLEASE THE COURT:

The Petition of General Tomoyuki Yamashita respectfully
shows to this Honorable Court:

Summary Statement of the Matter Involved

1. Petitioner was, prior to 3 September, 1945, when he
surrendered to the United States Army at Baguio, Luzon,
Philippines, the Commanding General of the 14th Army
Group of the Imperial Japanese Army. Respondent, Lieu-

tenant General Wilhelm D. Styer, is the Commanding General of the United States Army Forces, Western Pacific, with Headquarters in Manila. On 3 September, 1945, petitioner became a prisoner of war and was interned as such at New Bilibid Prison, Muntinglupa, Rizal, Philippines, in conformity with Article 9 of the Geneva Convention of 27 July, 1929, relative to the treatment of prisoners of war, and of Paragraph 82 of the Rules of Land Warfare (FM 27-10, United States War Dept.). On 25 September, 1945, the respondent caused to be served on petitioner a certain "charge", alleging violation of the laws of war and thereupon petitioner was removed from the status of a prisoner of war and placed in confinement as an accused war criminal, in the custody of the respondent in said New Bilibid Prison and at the residence of the United States High Commissioner to the Philippines in Manila, at which place he is now confined. Thereafter on 8 October, 1945, respondent caused petitioner to be arraigned on the aforesaid charge before a purported military commission appointed by respondent. Petitioner pleaded "Not Guilty", and trial commenced 29 October, 1945, which trial is still proceeding.

2. Thereafter on 12 November, 1945, petitioner filed a petition for Writ of Habeas Corpus and Writ of Prohibition in the Supreme Court of the Philippines; respondent failed to appear and answer or otherwise plead in such proceedings. Said matter was argued before the Supreme Court of the Philippines on 23 and 24 November, 1945, by counsel for petitioner and by Mr. Delgado of the Manila law firm of Delgado, Dizon, Flores & Rodrigo, appearing *amici curiae* in opposition to the petitioner. On 27 November, 1945, the Supreme Court of the Philippines entered a Resolution, reading in part as follows:

"Upon consideration of the petition for habeas corpus and prohibition filed by Tomoyuki Yamashita against

Lt. Gen. Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific, G. R. No. L-129, and the argument presented by the petitioner's counsel and the *amici curiae*, at the hearing, the Court decided to deny the petition upon two grounds: First, the court has no jurisdiction to grant writs prayed for in accordance with the ruling laid down in Raquiza et al. vs. Bradford et al., G. R. No. L-44, wherein it was held (with the dissent of three Associate Justices) that "an attempt of our civil courts to exercise jurisdiction over the United States Army before such period expires, would be considered as a violation of this country's faith, which this Court should not be the last to keep and uphold"; and second, that our jurisdiction, if at all, is limited to an inquiry as to the legality and jurisdiction of the Military Commission trying the petitioner, and the Court finds that said Military Commission has been validly constituted by the respondent * * * and that the Military Commission has jurisdiction over the person of the accused, Tomoyuki Yamashita and the war crimes with which he is charged. * * *

Thereafter on 5 December, 1945, petitioner filed his Notice of Intention to petition for Writ of Certiorari in the Supreme Court of the United States which said notice was filed in the Supreme Court of the Philippines after being duly served upon the respondent and upon Messrs. Delgado, Dizon, Flores & Rodrigo, *amici curiae*.

3. On 26 November, 1945, petitioner forwarded by registered air-mail, a petition for leave to file an original petition for Writ of Habeas Corpus and a Writ of Prohibition with this Honorable Court, which said Petition should now be in the office of the Clerk of this Court. The present proceedings, petitioning for a Writ of Certiorari to review the adverse decision of the Supreme Court of the Philippines is prosecuted in addition to such original petition for Writ of Habeas Corpus and Writ of Prohibition.

Questions Presented

- 1. Does the Supreme Court of the Philippines have jurisdiction to grant a Writ of Habeas Corpus and a Writ of Prohibition directed to the respondent as Commanding General, United States Army Forces, Western Pacific?**
- 2. There being no martial law, no military government of occupied territory and no active hostilities in the Philippines at the time of the appointment of the Military Commission, was there authority to appoint the Commission and does it have jurisdiction?**
- 3. Does the "charge" against the petitioner state an offense against the laws of war?**
- 4. Does the directive of the Commander-in-Chief, United States Army Forces, Pacific, establishing the rules of procedure under which the Military Commission is purporting to act, deny petitioner the fair trial guaranteed by the Constitution of the United States and the Constitution of the Philippines and is it in violation of Articles of War 25 and 38 and of the provisions of the laws of the United States and the Philippines?**
- 5. Was the respondent granted authority by the Commander-in-Chief, United States Army Forces, Pacific, to appoint a Military Commission and to try the petitioner in the Philippines?**
- 6. Can the United States properly and legally try petitioner on the charge, inasmuch as no notice of the trial was given to the protecting power of Japan, as made mandatory by the Geneva Convention of 27 July, 1929, relative to the treatment of prisoners of war?**

Reasons for Granting Writ

- 1. The decision of the Supreme Court of the Philippines that it lacks jurisdiction over the United States Army,**

poses a problem of supreme importance. If that decision is allowed to stand, it means that in United States territory, the acts of the United States Army, and of all other Federal agencies are beyond judicial scrutiny. Such a position appears to be unsound in view of the provisions of the following:

The Organic Act of the Philippines (Act of 1 July, 1902, Chapter 1369, 32 Statutes at Large 691).

The Jones Law (Act of 29 August, 1916, Public Law 240, 64th Congress, 39 Statutes at Large 545).

The Tydings-McDuffie Law (Act of 24 March, 1934, Public Law 127, 73rd Congress).

Section 1 Sub-paragraph 13 of the Ordinance Appended to the Constitution of the Philippines.

and if sustained, would result in the creation of an unprecedented legal vacuum.

2. This Court should determine whether or not, in the absence of martial law, military government, or active hostilities, in territory of the United States, where local courts are open and operating, an Army Commander, may on his own prerogative, appoint a military commission for the trial of offenses against the laws of war.

3. This Court should determine whether or not the "charge" in this case constitutes a violation of the laws of war properly cognizable by a Military Commission in that it in effect makes a Commanding General of Armed Forces the guarantor of the actions of his troops and requires that he must answer criminally therefor regardless of fault on his part.

4. This Court should determine whether or not, if this Military Commission was legally and properly appointed, it may disregard Acts of Congress which by their terms refer to Military Commissions and whether the Constitution of the United States and the Constitution of the Philippines

require that the minimum essentials of a fair trial be assured to the accused.

5. Other trials of alleged War Criminals by Military Commissions are now in progress in the Philippine Islands, and further such trials are projected. This case poses problems that go to the basis of all such trials and it is therefore important that these questions be determined by this Court.

WHEREFORE, it is respectfully prayed that this petition for a Writ of Certiorari to review the decision and judgment of the Supreme Court of the Philippines in this case, be Granted.

Respectfully submitted,

TOMOYUKI YAMASHITA,

Petitioner.

HARRY E. CLARK, JAGD,

AG, Correction Division,

HQ. AFWESPAC, APO 707,

% Postmaster, San Francisco, Calif.

JAMES G. FELDHAUS, LT. COL., JAGD,

WALTER C. HENDRICK, LT. COL., JAGD,

GEORGE F. GUY, MAJOR, CAVALRY,

A. FRANK REEL, CAPTAIN, JAGD,

MILTON SANDBERG, CAPTAIN, JAGD.

UNITED STATES OF AMERICA,

Commonwealth of the Philippines,

City of Manila :

GENERAL TOMOYUKI YAMASHITA, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has had read to him and understands the translation of the foregoing peti-

tion; that he knows the contents thereof and that the said contents and all statements made in the said petition are true as he verify believes,

TOMOYUKI YAMASHITA

Subscribed and sworn to before me this 4th day of December, 1945.

ROBERT B. HARBISON, LT. COL., JAGD.

UNITED STATES OF AMERICA,

Commonwealth of the Philippines,

City of Manila:

MASAKATSU HAMAMOTO, being duly sworn, deposes and says that he truly translated the aforesaid petition from English into Japanese to the petitioner and that the petitioner thereupon in his presence affixed his signature and made oath thereto.

MASAKATSU HAMAMOTO.

Subscribed and sworn to before me this 4th day of December, 1945.

ROBERT B. HARBISON, LT. COL., JAGD.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

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vs.

LIEUTENANT GENERAL WILHELM D. STYER, COM-
MANDING GENERAL, UNITED STATES ARMY FORCES, WESTERN
PACIFIC

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

Opinion of the Lower Court

The decision and judgment of the Supreme Court of the Philippines, promulgated by the Court's Resolution of 27 November, 1945, is to be found on page 71 of the Record herein. As of this date no opinion of the Supreme Court of the Philippines has been written or reported; when the same becomes available a copy will be forwarded to the Supreme Court of the United States.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under Section 1, Subparagraph 13 of the

Ordinance Appended to the Constitution of the Philippines and under Section 2, Subparagraph 13 and Section 7, Subparagraph 6 of Public Law 127 of 1934. The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

Hooven & Allison v. Eratt, 63 S. Ct. 370 (1943);

Grafton v. United States, 206 U. S. 333 (1907).

Statement of the Case and Statutes Involved

A full statement of the case appears in the petition under the heading "Summary Statement of the Matter Involved", pages 1 to 3, *supra*.

The statutes involved are:

The Organic Act of the Philippines (Act of 1 July 1902; Chapter 1369, 32 Statutes at Large 691).

The Jones Law. (Act of 29 August 1916, Public Law 240, 64th Congress, 39 Statutes at Large 545).

The Tydings-McDuffie Law (Act of 24 March 1934, Public Law 127, 73rd Congress).

Section 1, sub-paragraph 13 of the Ordinance Appended to the Constitution of the Philippines.

Article of War 25.

Article of War 38.

Specification of Errors

The Supreme Court of the Philippines erred:

1. In holding that it did not have jurisdiction to grant a Writ of Habeas Corpus and a Writ of Prohibition directed to the respondent as the Commanding General, United States Army Forces, Western Pacific.

2. In holding that the Military Commission was properly constituted and appointed and has jurisdiction although there was no martial law, no military government or

cupied territory, and no active hostilities at the time of such constitution and appointment.

3. In overruling petitioner's contention that the charge against him does not state an offense against the laws of war.

4. In overruling petitioner's contention that the directive of the Commander-in-Chief, United States Army Forces, Pacific, entitled "Regulations Governing the Trial of War Criminals" under which the Military Commission is purporting to act denies the petitioner the fair trial guaranteed by the Constitution of the United States and the Constitution of the Philippines and is in violation of Articles of War 25 and 38 and of other provisions of the laws of the United States and the Philippine Islands.

5. In overruling petitioner's contention that respondent was not granted authority by the Commander-in-Chief, Army Forces Pacific, to appoint the Military Commission and to try the petitioner in the Philippines.

6. In overruling petitioner's contention that the United States cannot legally and properly try the petitioner on the charge inasmuch as no notice of the trial was given to the protecting power of Japan as made mandatory by the Geneva Convention of 27 July, 1929, relative to the treatment of Prisoners of War.

Argument

THE SUPREME COURT OF THE PHILIPPINES HAD JURISDICTION TO GRANT A WRIT OF HABEAS CORPUS AND A WRIT OF PROHIBITION DIRECTED TO THE RESPONDENT AS COMMANDING GENERAL, UNITED STATES ARMY FORCES, WESTERN PACIFIC.

The Supreme Court of the Philippines has jurisdiction to grant a writ of habeas corpus and a writ of prohibition

directed to the respondent as Commanding General, United States Army Forces, Western Pacific. A contrary view will result in an untenable situation, namely, that the acts of the United States Army, and for that matter of all other federal agencies in the Philippine Islands, will be put entirely beyond judicial scrutiny. The jurisdiction of the Philippine Supreme Court under the present system of government is clearly provided for by the following authorities:

- The Organic Act of the Philippines (Act of 1 July 1902: Chapter 1369, 32 Statutes at Large 691):**
- The Jones Law, Act of 29 August 1916, Public Law 240, 64th Congress, 39 Statutes at Large 545):**
- The Tydings-McDuffie Law (Act of 24 March 1934, Public Law 127, 73rd Congress):**
- Section 1, sub-paragraph 13 of the Ordinance Appended to the Constitution of the Philippines.**

II

THE MILITARY COMMISSION PRESENTLY TRYING THE PETITIONER IS WITHOUT JURISDICTION.

The Military Commission presently trying the petitioner is without jurisdiction. The Commission was appointed by the Commanding General, United States Army Forces, Western Pacific pursuant to authority delegated to him by the Commander-in-Chief, United States Army Forces, Pacific. The record does not show any grant of authority from either the Congress of the United States or the President of the United States. A military commander has power to appoint a military commission only where there is martial law, military government of occupied territory or active hostilities.

There is neither martial law nor military government in the Philippines. Hostilities ceased on or about 2 Septem-

bér 1945. There is today no justification in law for the exercise by the Commander-in-Chief, Army Forces Pacific, of this extraordinary power.

The Philippine Islands is not an area occupied by the armed forces. Paragraph 271, War Department Field Manual, "Rules of Land Warfare," defines "occupied territory" in its reprint of Article 42 of the Annex of the Hague Convention, October 18, 1907: "A territory is considered occupied when it is actually placed under the authority of the hostile army." The United States is not and never has been a hostile army with respect to the Philippine Islands. The re-entry into the Philippine Islands in 1944 and 1945 constituted a recovery of territory, rather than an occupation. From the date of re-entry on Philippine soil, the Commander-in-Chief, United States Army Forces, Pacific, consistently affirmed and recognized the full governmental responsibility of the Philippine Commonwealth. This is evidenced by publications in the Official Gazette, April 1945, page 86; May 1945, pages 145 to 148; September 1945, page 494.

On 22 August 1945, the Commander-in-Chief, United States Army Forces, Pacific, issued the following proclamation: "Effective on September 1, 1945, United States Army Forces in the Pacific shall cease from further participation in the civil administration of the Philippines, as such is no longer necessary."

III

THE CHARGE IN THIS CASE FAILS TO STATE A VIOLATION OF THE LAWS OF WAR BY THE PETITIONER

The charge in this case fails to state a violation of the laws of war by the petitioner. The Bills of Particulars which implement the charge fail to cure the defect of the charge. On the contrary, they narrow the gravamen of

the charge. In no instance is it alleged that petitioner committed or aided in the commission of a crime or crimes. In no instance is it alleged that the petitioner issued an order, expressly or impliedly, for the commission of the crime or crimes. Nor is it alleged that the petitioner authorized the crimes prior to their commission or condoned them thereafter.

The charge alleges that the petitioner failed in his duty to control his troops, permitting them to commit certain alleged crimes. The Bills of Particulars, however, set forth no instance of neglect of duty by the petitioner. Nor do they set forth any acts of commission or omission by the petitioner amounting to a "permitting" of the crimes in question.

The substance, therefore, of the allegations is that the petitioner is not charged with having done something or having failed to do something but solely with having been something, to-wit: commander of Japanese forces.

American jurisprudence recognizes no such principle so far as its own military personnel is concerned. The Articles of War denounce and punish improper conduct by military personnel, but they do not hold a commanding officer responsible for the crimes committed by his subordinates. It cannot properly be contended that the Commanding General of an American occupational force becomes a criminal every time an American soldier violates the law. Neither the laws of war nor the conscience of the world upon which they are founded will countenance the support of any such charge. It is the basic premise of all civilized criminal justice that it punishes not according to status but according to fault, and that one man is not held to answer for the crime of another.

It is an incontrovertible fact that the branding of military personnel as war criminals is not predicated upon the mere fact of command of any troops, but rather upon the im-

proper exercise of that command. This point is recognized officially by the War Department in its publication "The Rules of Land Warfare" (FM 27-10, Section 345.1), which provides as follows:

"Liability of Offending Individuals.—Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to the order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished."

There is nothing stated therein that would indicate that the Commanding General of a force is responsible, under the Laws of War, for any offenses committed by members of his command which were committed without his sanction. Under this provision, liability for war crimes is imposed on the persons who commit the crimes and on the officers who order the commission thereof. The war crime of a subordinate, committed without the order, authority, or knowledge, of his superior, is not the war crime of the superior. The pleadings in this case do not allege that the petitioner ordered, authorized, or had knowledge of the commission of any of the alleged atrocities or war crimes. The pleadings do not state an offense under the Laws of War and the Commission was, therefore, without jurisdiction to try the case. In *Ex Parte Quirin* (317 U. S. 1 (1942)), this Court said:

"Congress . . . has exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the Law of War, are cognizable by such tribunals . . . We are con-

cerned only with the question of whether it is within the constitutional power of the national government to place petitioners on trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the Law of War cognizable before a military tribunal, and if so, whether the Constitution prohibits the trial."

The court found that the allegations contained in the charges against Quirin and his associates were offenses against the Laws of War. Had it been found that those allegations did not constitute offenses against the Laws of War, presumably this Court would have ruled that the military commission had no jurisdiction.

IV.

THE DIRECTIVE OF THE COMMANDER-IN-CHIEF, UNITED STATES ARMY FORCES, PACIFIC, ESTABLISHING THE RULES OF PROCEDURE AND EVIDENCE UNDER WHICH THE MILITARY COMMISSION IS PURPORTING TO ACT, DENIES THE PETITIONER THE FAIR TRIAL GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE PHILIPPINE ISLANDS AND IT VIOLATES ARTICLES OF WAR 25 AND 38 AND THE PROVISIONS OF THE LAWS OF THE UNITED STATES AND THE PHILIPPINE ISLANDS.

The said directive permits the admission of depositions and *ex parte* affidavits, and throughout the trial the Commission has admitted such "evidence." Article 25 of the Articles of War prohibits the introduction of depositions by the Prosecution in a capital case. The Article specifically sets forth that this prohibition applies not only in court-martial proceedings but also in proceedings before a military commission.

This is one of the few instances in which an Article of War by its very terms, refers to "military commissions," and it is in no wise extraordinary that it does so, for it is

one of the most firmly founded principles of American justice that the accused in a capital case, whatever his nationality, should have the opportunity to openly confront the witnesses against him and to cross-examine them on their testimony.

In accordance with the said directive, the Commission has persistently ruled throughout the trial that hearsay evidence is admissible. Article of War 38 states:

"The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the United States, provided that nothing contrary to or inconsistent with these Articles shall be so prescribed: provided, further, that all rules made in pursuance of this Article, shall be laid before the Congress annually."

Although the President in the Manual for Courts-Martial has by executive order prescribed the procedure, including modes of proof, in court-martial cases, he has not taken any action prescribing procedure and modes of proof before military commissions, particularly this military commission. In the absence of such action by the President of the United States it appears to be the clear intent of Congress that the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the United States should apply. Such rules would prohibit the introduction of hearsay evidence. The directive upon which the Commission based its action in admitting hearsay and other inadmissible evidence, stems from the Commander-in-Chief, United States Army Forces, Pacific, but was without authorization by the

President of the United States or the Congress of the United States.

V

THE RESPONDENT WAS ACTUALLY GRANTED NO AUTHORITY BY THE COMMANDER-IN-CHIEF, UNITED STATES ARMY FORCES, PACIFIC, TO APPOINT A MILITARY COMMISSION TO TRY THE PETITIONER IN THE PHILIPPINE ISLANDS.

The authority to respondent was limited as follows:

"The military commissions established hereunder shall have jurisdiction over all Japan and all other areas occupied by the armed forces, commanded by the Commander-in-Chief, United States Army Forces, Pacific."

As pointed out, *supra*, the Philippine Islands is not an area occupied by the armed forces.

VI

THE TRIAL IS IMPROPER AND ILLEGAL INASMUCH AS NO NOTICE THEREOF WAS GIVEN TO THE PROTECTING POWER OF JAPAN, AS MADE MANDATORY BY THE GENEVA CONVENTION OF 27 JULY, 1929, RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

Conclusion

It is submitted that the writ herein prayed for should issue and that the judgment of the Supreme Court of the Philippines in this case should be reversed.

Respectfully submitted,

HARRY E. CLARKE, Colonel, JAGD,
 JAMES G. FELDHAUS, Lt. Col., JAGD,
 WALTER C. HENDRIX, Lt. Col., CMP.,
 GEORGE F. GUY, Major, Cav.,
 A. FRANK REEL, Captain, JAGD,
 MILTON SANDBERG, Captain, JAGD,

Counsel for Petitioner.